

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-**78-733**

LEWIS W. POE,
Petitioner,

VS.

PERCY D. MITCHELL, JR.,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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November, 1978

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Lewis W. Poe, petitioner, prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The United States District Court for the Southern District of Ohio, Western Division, rendered judgment without opinion. Without delivering an opinion, the Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court.

JURISDICTION

The judgment of the Court of Appeals in the form of an order (App. A, *infra*, p. A1) was entered on July

7, 1978. A timely petition for rehearing was denied without opinion on August 29, 1978 (App. B, *infra*, p. A3).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a military physician, acting at a routine medical level and *outside* the scope of his authority, is entitled to absolute immunity from civil liability by virtue of his being a serviceman.
2. Whether one serviceman may sue another serviceman for unlawful, unconstitutional, and intentionally reckless conduct, including medical fraud, which occurred while the defendant serviceman was acting under color of his office beyond the scope of his authority.
3. Whether the courts below deprived Mr. Poe of procedural due process of law when they prematurely dismissed his *pro se* action as the result of their erroneous acceptance of the unsupported *assumption* that the defendant serviceman was in fact acting in good faith and within the scope of his authority.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The First Amendment provides, in part:

Congress shall make no law * * *; * * * abridging the freedom of speech, * * *; or the right of the people * * * to petition the Government for a redress of grievances.

The Fourth Amendment provides, in part:

The right of the people to be secure in their persons, * * *, against unreasonable * * * seizures, shall not be violated, * * *.

The Fifth Amendment provides, in part:

No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *.

The Ninth Amendment provides:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Paragraph 4-35 of Air Force Manual 168-4, "Administration of Medical Activities," dated 15 March 1973, provides:

"Disposition of Person Who Refuses Professional Care.

A medical board will examine any military member who refuses to submit to medical or dental treatment, surgical operation, or diagnostic procedure. If the person bases his refusal on religious grounds, the hospital commander will arrange for the appointment of a chaplain as an additional member of the board. The board must decide whether:

- a. The patient needs the treatment in order to properly perform his military duties, and
- b. The treatment can normally be expected to produce the desired results. When the decision on both points is affirmative, the person will be so advised. If he still refuses, he may be tried by courts-

martial. Whether or not disciplinary action is taken, the unit commander may initiate appropriate action, such as discharge, retirement, etc. However, before doing so, he will refer the case to HQ USAF/SGP, Wash DC 20314, for consideration and review.

NOTE: When emergency treatment, surgery, or diagnostic procedure is required to preserve the health or life of the patient, it may be performed with or without his permission. The same is true when a diagnostic procedure or treatment is necessary to protect the health or life of a patient who has been declared by a qualified psychiatrist to be mentally incompetent."

STATEMENT OF THE CASE

On August 5, 1976, former Air Force Captain Lewis William Poe filed a *pro se* complaint for damages against former Air Force Major Percy D. Mitchell, Jr. in the U. S. District Court for the Southern District of Ohio, Western Division. The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. 1332.

Poe alleged that his injury was sustained in the course of an unlawful and involuntary medical examination of him by defendant Dr. Mitchell, wherein the defendant caused the forcible injections of drugs—and himself injected a drug—into the person of Poe *without* Poe's consent, *against* Poe's will, and over Poe's protests. After said unlawful examination, medical mistreatment, trespass, and the invasion of Poe's privacy, the defendant allegedly dictated, signed, and published on June 27, 1974 a knowingly false, defamatory, and fraudulent psychiatric report

which immediately served as the documentary basis for an Air Force determination that Poe was "70% mentally disabled" when, in fact, there was no mental disability at all. Subsequently, Poe was relieved from active duty in 1974 because of Dr. Mitchell's *documented* "diagnosis of schizophrenia."¹ Net result: an honorable discharge *with stigma* for Capt Poe for the remainder of his life.

This particular case involved the "tail-end" of a conspiracy of Air Force officers to discredit Capt Poe and to unlawfully separate him from the Air Force so as to cover up wrongdoings and the dereliction in the performance of military duties by military commanders and medical officers.²

In the summer of 1974, Poe was unlawfully arrested at Dover AFB, Delaware, then transported across several State boundaries under duress, and thereafter involuntarily confined in a psychiatric ward at Wright-Patterson AFB, Ohio, in gross violation of the First, Fourth, Fifth, and Ninth Amendments and in violation of Air Force regulations.

1. Exhibit A, dated 17 Dec 1976, which was appended to the Brief of the Appellant in the Court of Appeals for the Sixth Circuit, indicated:

"Capt Poe presented to the Board as an articulate, rational, and coherent individual. His candid testimony, cooperation, and demeanor was exemplary. We recognize that the PEB [Physical Evaluation Board] does not usually address itself to the validity of the initial diagnosis. However, after careful consideration and evaluation of all documents and the testimony in this case, the Board finds that the preponderance of evidence is against the diagnosis of schizophrenia. At the very least, the evidence cast considerable doubt on this diagnosis." /s/ Joseph A. Gelet, Colonel, USAF, President, Formal USAF Physical Evaluation Board.

2. In the interest of brevity and for background information, this Court is referred to Docket No. 78-589, *Poe v. United States of America*, Petition for a Writ of Certiorari to the U. S. Court of Appeals for the Ninth Circuit, filed October 10, 1978, in this Court by Mr. Brook Hart of Honolulu, Hawaii.

On June 11, 1974, Airman Paul E. Klinker of Dover AFB wrote in his letter³ to U. S. Senator Birch Bayh of Indiana:

On June 5th, 1974, Captain Poe was taken under custody. The Commander of the Security Police Squadron and three other security policemen made an arrest and escorted Captain Poe across the street to the parking lot. They jacked him up and searched him ***.

I have been working with Captain Poe for approximately 6 months. I have great respect for this man. He always stands up for what is right and just. I think he is perfectly sane. Yet he is in an institution at Wright-Patterson AFB, Ohio and has been for one week now. Please help me to help him, so that I may still have faith in our fine country and justice."

After Poe's confinement in a psycho ward, the conspiracy to discredit him was virtually complete for now no one would believe him since he was essentially considered a "psycho." But the conspiracy did not end here. Poe alleged that on June 20, 1974—3 weeks after his confinement—defendant Mitchell told Poe that Poe did not have a psychiatric disorder nor a paranoid personality disorder. A week later, defendant Mitchell falsely and fraudulently published an official medical report, dated June 27, 1974, wherein he wrote, in part:

"DIAGNOSIS [of Capt Poe]: Schizophrenia, paranoid type, chronic, severe; manifested by severe affective disorder, pressured speech, paranoid de-

lusional system, * * *. Impairment, marked for further military duty; severe for vocational and social adaptation."

In his complaint, Poe alleged that (a) while it was within his power, Poe refused to be examined by USAF medical personnel and did not consent to any psychiatric treatment; (b) the defendant took it upon himself to force drug treatment upon Poe for no justifiable medical reason. This forced treatment upon Poe was not for Poe's direct benefit because there was nothing medically nor emotionally wrong with Poe; (c) there was no doctor-patient relationship between the defendant and the plaintiff; (d) the defendant was an Air Force psychiatrist who acted under color of federal law in excess of his lawful authority such that he departed from his official duty whereby his acts became his own personal acts; (e) on June 6, 1974, Poe received the initial forced injection against his will, without his consent, and over his verbal protest.

Poe's complaint included two affidavits, namely, the Affidavit of Lt. Sharon J. Sees, dated 10 May 76, and the Affidavit of SSgt Richard E. Deal, dated 4 June 76. These affidavits indicated that Capt Poe was not mentally ill during his psychiatric confinement at Wright-Patterson AFB, Ohio.

In paragraphs 38, 40, and 41 of his complaint, Poe alleged as follows:

"38. On August 18 and 17, 1974, Poe underwent a psychiatric evaluation (unbeknown to the Air Force hospital staff) by a civilian psychiatrist, who has subsequently documented in a report which was sent directly to an attorney: 'Diagnostic Impression: Compulsive Personality.'"

3. Airman Klinker's letter is Exhibit A which was appended to Poe's Petition for Rehearing in the Court of Appeals for the Sixth Circuit.

"40. On September 4, 1974, Poe was officially separated from the Air Force for a non-existent disability."

"41. On September 8, 1974, at Poe's own request, Poe was admitted to a psychiatric facility under the supervision of a civilian psychiatrist to further evaluate Poe and to conduct a '600-mg Thorazine' experiment because of the false and fraudulent documentation by defendant Mitchell. This report was sent directly to an attorney, and it stated:

'When he [Poe] took the 100 and 200 mg TID, he was drowsy and his gait was a little wobbly and he fell asleep often during the day. * * *. The last two days of medication, his speech became slurred; he was having serious difficulties concentrating, staggered when he walked, * * *.'

* * * there are no sighs [sic] of paranoid thinking or signs of psychosis evident. His associations were not loose, there were never signs of tangential thinking. * * *.

Mr. Poe will be discharged on September 20, 1974, and he can go back to work right away.'

On August 5, 1976, Poe filed his complaint against defendant Mitchell.

On October 15, 1976, the defendant *untimely* filed in the District Court his Motion to Dismiss the plaintiff's action on the following grounds:

- (1) lack of subject matter jurisdiction, and
- (2) failure to state a claim upon which relief can be granted.

In his Affidavit, dated 3 November 1976, which was attached to his Nov. 9, 1976 Opposition to the defendant's Motion to Dismiss, Mr. Poe declared *under oath*:

"* * *; that I was falsely arrested on May 29, 1974, and thereafter, on May 31, 1974, unlawfully, unconstitutionally, totally, and involuntarily confined * * *;

* * *.

That Major Percy D. Mitchell, Jr., a USAF physician, *wrote*, in part, in his June 9, 1974 entry on Standard Form 509, Doctor's Progress Notes: 'Pt [Poe] now under my care. He has been given 400 mg Thorazine/day requiring only two shots of 50 mg IM for refusal to take P.O. meds.' /s/ P. Mitchell.

* * *.

That the so called 'care and treatment' which were provided at Wright-Patterson USAF Medical Center were *forced* upon me without my consent, against my will, over my verbal protest, contrary to law and sound medical principles, and in violation of my constitutional right of privacy and bodily integrity. * * *."

After briefing by the parties and without oral argument, the District Court filed its order on December 15, 1976, granting the defendant's Motion to Dismiss.

On January 14, 1977, Poe filed his Notice of Appeal.

On July 7, 1978, without a hearing, the Sixth Circuit affirmed the judgment below, stating in its Order (App.A, *infra*, p. A2):

"We conclude that a person on active military duty who is acting within the scope of his assigned duties

may not be required to answer in damages to another member of the armed forces who claims injuries resulting from those acts, whether negligent or otherwise."

In the "Conclusion" portion of his Petition for Rehearing, Poe wrote:

"Defendant Mitchell has acted outside the scope of his authority. The defendant has not in the slightest carried the burden of showing that he is entitled to the defense of absolute immunity. It appears inconsistent that the district court and the Sixth Circuit should presume that the defendant was acting within the scope of his medical duties in light of the serious allegations in the Complaint; * * *."

On August 29, 1978, the Sixth Circuit filed its Order, denying Poe's petition for rehearing.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should issue in this case because:

1. The existence of conflicting decisions in several judicial Circuits leaves a critical federal question unanswered in our ever-changing society. How should the federal courts *apply* the so-called "serviceman's immunity" doctrine, assuming it to be currently viable, to situations in which the defendant serviceman is *not* acting in line of duty or within the scope of his legal authority? Is such a defendant serviceman *automatically* entitled to absolute immunity? Does such a defendant serviceman, prior to his possible immunization by the Court, have the burden of showing that his conduct was within the scope of his

lawful duty and that his conduct was the type of action which entitled him to the defense of immunity?⁴

Although there is authority that a serviceman may not sue a military doctor for *negligent* acts which occurred while the military doctor was *performing in the line of duty*, *Bailey v. Van Buskirk*, 345 F.2d 298 (9 Cir. 1965), cert. den., 383 U.S. 948 (1966); *Bailey v. DeQuevedo*, 375 F.2d 72 (3 Cir. 1967), cert. den., 389 U.S. 923 (1967); *Tirrill v. McNamara*, 451 F.2d 579 (9 Cir. 1971); *Martinez v. Schrock*, 537 F.2d 765 (3 Cir. 1976), we should carefully distinguish between military medical (mal)practice performed in good faith in line of duty with the consent of the military patient and military medical practice performed in bad faith, outside the line of duty, and in the clear absence of the consent of the military patient. The Third Circuit conceded⁵ that the *Bailey* rationale has not captured universal acceptance, referring to the case of *Henderson v. Bluemink*, 167 U.S. App. D.C. 161, 511 F.2d 399 (D.C. Cir. 1974). Indeed the District of Columbia Circuit refused to immunize Army Major/Doctor Bluemink because it recognized a crucial distinction between governmental discretion and medical discretion, declaring that the "policy [of official immunity] is not applicable to the exercise of normal medical discretion." *Henderson, supra*, 511 F.2d at 403.⁶ We should also note that a Veterans Administration doctor-administrator and a psychia-

4. Please note that "federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope." *Butz v. Economou*, ____ U.S. ___, 98 S.Ct. 2894, 2911 (1978).

5. *Martinez v. Schrock*, 537 F.2d 765, 767, fn. 1 (3 Cir. 1976).

6. Reinforcing is the fact that "[t]he executive privilege does not apply, however, where the conduct [of the defendant] is outside the employee's scope of authority." *Estate of Burks v. Ross*, 438 F.2d 230, 235 (6 Cir. 1971).

trist were granted absolute immunity in 1971 by the Sixth Circuit⁷ while at the same time denying immunity to hospital assistants and nurses.

"In *Estate of Burks*, the court applied a 'discretionary-ministerial' analysis, but failed to draw the distinction between medical and governmental discretion which we deem essential to a proper application of that analysis." [footnote omitted] *Henderson, supra*, at page 403.

The decision in *Bailey*—a pre-*Scheuer*⁸ decision—came at a time when federal officials with discretionary duties enjoyed absolute immunity from damage suits if they were acting within the scope of their authority or in line of duty. In general, the *Scheuer* Court had transformed the doctrine of absolute immunity into one of qualified/limited/conditional immunity which was dependent upon "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based."⁹

In the words of dissenting Chief Judge Seitz in *Martinez v. Schrock, supra*, at p. 774 (3 Cir. 1976):

"Although defendants' [two Army surgeons'] acts were discretionary in nature, it is clear that they were imbued, * * *, with *medical* and not *governmental* discretion. I therefore believe that defendants' acts were not governmental in nature and that defendants are not shielded from any liability which may arise out of the performance of those acts under the doctrine of qualified immunity."

7. *Estate of Burks v. Ross*, 438 F.2d 230 (6 Cir. 1971).

8. *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

9. *Ibidem*.

Furthermore, "specific unlawful conduct by military personnel" may subject them to accountability "by way of damages or injunctive relief" in a court of law. *Scheuer v. Rhodes*, 416 U.S. 232, 249 (1974), quoting *Gilligan v. Morgan*, 413 U.S. 1, 11-12 (1973).

An important federal issue has not been, but should be, finally settled by this Honorable Court. Over the years, the judiciary has created, extended, and modified the doctrine of immunity. Today this Court has an opportunity to definitively settle the question of under what conditions will a serviceman be immune, or not immune, from a damage suit brought by a plaintiff serviceman.

The adjudication of this important issue will hone the immunity doctrine with respect to all military personnel, will make it possible for the inferior courts to uniformly administer the "final law" relative to the so-called "serviceman's immunity" doctrine, and will eventually benefit all Americans, especially the honorable servicemen and women who may presently tremble and shudder under the ire of their commander for legitimately standing up for their military and civil rights or for legitimately "blowing the military whistle" on their commander.

2. The third question presented for review concerns the clear and gross denial of procedural due process of law and is of sufficient constitutional and administrative importance to warrant a review (a) because of the manner in which this case was decided below and (b) because the decisions of both the District Court and the Sixth Circuit are in direct conflict with the Supreme Court's "due process" holding in *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

Poe alleged in his complaint that "Defendant Mitchell acted under color of federal law in excess of his lawful

authority, or, if within the scope of his official medical duties or medical position, he acted in an arbitrary, intentionally reckless, wanton, collusive, knowingly fraudulent, and/or unconstitutional manner such that he effectively departed from his official duty whereby his acts became his own personal acts." Poe further alleged the defendant knowingly, fraudulently, and in disregard of the foreseeable consequences of his acts, dictated, signed, and published in bad faith a false and defamatory medical document which "indicated" that Poe was mentally ill.

The District Court and the Sixth Circuit not only disregarded the presumed truth of Poe's allegations, thereby construing his complaint in light most favorable to the defendant, but somehow erroneously assumed that defendant Mitchell was in fact acting within the scope of his duty or authority.¹⁰ Thus, on the basis of this assumption, the courts below automatically and prematurely immunized the defendant and consequently dismissed the action in the absence of any oral argument, without any evidentiary hearing to determine a crucial question of fact, and before any answer was filed by the defendant.

The District Court erroneously assumed that the defendant was "clearly acting within the parameters of his line of duty" while the Court of Appeals erroneously assumed the same when it concluded that an active duty serviceman who is acting within the scope of his assigned duties may not be required to answer in damages to another serviceman. Under these circumstances, the conclusions

10. In his dismissal motion, the defendant simply asserted that his acts were "in the performance of his official military duties" and attached an affidavit which essentially indicated that the defendant had treated Poe while the defendant was a Major on active duty in the Air Force, performing duty as a physician assigned to the USAF Medical Center, Wright-Patterson AFB, Ohio.

of the inferior courts were erroneous and in direct conflict with the judgment of the Supreme Court in *Scheuer, supra*, wherein this Court held that the District Court had acted prematurely in dismissing the complaints and that, in light of the allegations of their respective complaints, the plaintiffs were entitled to have them judicially resolved; and wherein Mr. Chief Justice Burger wrote, in pertinent part:

"Fairly read the complaints allege that each of the named defendants, * * *, acted either outside the scope of his respective office or, if within the scope, acted in an arbitrary manner, grossly abusing the lawful powers of office.

* * *.

When a federal court reviews the sufficiency of a complaint, before the reception of any evidence * * *. The issue is * * * whether the claimant is entitled to offer evidence to support the claims.
* * *.

* * *.

* * *. The District Court acted before answers were filed * * *. In dismissing the complaints, the District Court and the Court of Appeals erroneously accepted as a fact the good faith of the Governor, * * *. There was no opportunity afforded petitioners to contest the facts assumed in that conclusion. There was no evidence before the Courts from which such a finding of good faith could be properly made
* * *.

* * *. Similarly, the complaints place directly in issue whether the lesser officers and enlisted personnel of the [National] Guard acted in good-faith obedience to orders of their superiors. Further proceed-

ings, * * *, are required. The complaining parties are entitled to be heard more fully than is possible on a motion to dismiss a complaint.

* * * *

The judgments of the Court of Appeals are reversed * * *."

3. Simple justice requires it. Mr. Poe was not only *physically* deprived of the specific and penumbral guarantees under the Bill of Rights but was deviously separated from the United States Air Force with the stigma of being mentally ill when there was no basis in fact for that (fraudulently documented) diagnosis. Mr. Poe will, for the remainder of his life, carry the *false and tenacious* psychodiagnostic label of being, or having been, a "severe, chronic, paranoid schizophrenic." Mr. Poe has suffered enough.

CONCLUSION

The petitioner has only this Court of Justice to turn to for the resolution of this litigation . . . and for ultimate justice.

Mr. Poe is *not* asking for special consideration or special treatment for himself simply because this whole matter *transcends* what happened to him as an individual. In effect, this case is representative of what can occur—and what in fact did occur—when government officials, acting under color of their office with the implied sanction of the sovereign, abuse and misuse the powers entrusted to them by virtue of their official position.

For the above reasons, petitioner humbly urges this Court to grant this petition for a writ of certiorari.

Respectfully submitted,

LEWIS W. POE

Petitioner Pro Se

November, 1978.

APPENDIX

APPENDIX A

No. 77-3110

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

LEWIS W. POE,
Plaintiff-Appellant,

v.

PERCY D. MITCHELL, JR.,
Defendant-Appellee.

ORDER

(Filed July 7, 1978)

BEFORE: PHILLIPS, Chief Judge; LIVELY, Circuit Judge;
and PECK, Senior Circuit Judge.

This appeal from dismissal of the plaintiff's complaint by the district court has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. The jurisdiction of the district court was based on diversity of citizenship. The district court held that the defendant was immune from suit since both the plaintiff and the defendant were on active military duty at the time of the acts which are the basis of the complaint.

In *Feres v. United States*, 340 U.S. 135, 141 (1950), the Supreme Court stated, "We know of no American law which ever has permitted a soldier to recover for

negligence, against either his superior officers or the Government he is serving." (citation omitted). We conclude that a person on active military duty who is acting within the scope of his assigned duties may not be required to answer in damages to another member of the armed forces who claims injuries resulting from those acts, whether negligent or otherwise.

The judgment of the district court is affirmed. Rule 9(b)3, Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman

Clerk

APPENDIX B

No. 77-3110

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

LEWIS W. POE,
Plaintiff-Appellant,

v.

PERCY D. MITCHELL, JR.,
Defendant-Appellee.

ORDER

(Filed August 29, 1978)

BEFORE: PHILLIPS, Chief Judge; LIVELY, Circuit Judge;
and PECK, Senior Circuit Judge.

Upon consideration of the petition for rehearing filed herein by the plaintiff-appellant, the court concludes that the questions presented therein were fully considered and decided upon the original submission of this appeal.

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk